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Kenya: Labour and Employment Comparative Guide

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1 Legal framework

1.1 Are there statutory sources of labour and employment law?

The statutory sources of labour and employment law are as follows:

- The Constitution of Kenya 2010 provides for the rights and freedoms of employees, employers' organisations and trade unions.
- The Employment Act 2007 governs the relationship between employers and employees and provides for the minimum conditions of employment.
- The Labour Institutions Act (12/2007) governs the creation of labour institutions such as:
 - the National Labour Board, which advises the cabinet secretary for labour on employment matters;
 - the Commission of Inquiry;
 - the director of employment; and
 - other employment bodies, such as the Wages Council, which handle inspections and administration of labour relations.
- The Labour Relations Act 2007 governs the registration and relations of trade unions and employers' organisations, and promotes employees' freedom of association.
- The Occupational Safety and Health Act 2007 governs employees' safety, health and welfare in the workplace.
- The Work Injury Benefits Act 2007 governs the compensation of employees for injuries or diseases contracted during employment.
- The National Social Security Fund Act governs eligibility and terms of contribution to for employee pensions.
- The National Health Insurance Fund Act governs eligibility and terms of contribution to the national medical fund for employees.
- The Employment and Labour Relations Court Act 2014 and the Employment and Labour Relations (Procedure) Rules 2016 govern the establishment, jurisdiction, mandate and procedure of handling disputes in the Employment and Labour Relations Court.
- International treaties have also been ratified, including International Labour Organization conventions such as:
 - the Forced Labour Convention;
 - the Equal Remuneration Convention;
 - the Minimum Age Convention; and
 - the Worst Forms of Forced Labour Convention.

A comprehensive list can be found [here](#).

1.2 Is there a contractual system that operates in parallel, or in addition to, the statutory sources?

Yes, there is a contractual system that operates in parallel. A contract governs the relationship between an employer and an independent contractor/consultant.

1.3 Are employment contracts commonly used at all levels? If so, what types of contracts are used and how are they created? Must they be in writing must they include specific information? Are implied clauses allowed?

No, employment contracts are not commonly used at all levels.

'Casual employees' are employees who are engaged for up to 24 hours and who receive their wages at the end of the day, when their engagement terminates. Casual labourers do not enter into a contract with the employer. However, the law anticipates that if a casual employee is engaged continuously for more than one month or if his or her tasks cannot be completed within three months, the employment of the casual employee will be converted into full-time employment.

Other than casual employees, all other employees at any level must have an employment contract. Employment contracts can be oral or in writing. However, the employer has a duty under the law to reduce a contract into writing within two months of engaging an employee.

The employment contract must include employment particulars such as:

- the employee's personal details, such as his or her name, age and permanent address;
- the employer's details;
- a job description;
- relevant dates of commencement;
- details on termination of employment;
- hours of work;
- place of work;
- duration and form of employment;
- details of the employee's remuneration; and
- details of the employee benefits recognised by the law.

The parties can also include other terms and conditions in the contract, as long as these are not inconsistent with the minimum terms and conditions provided by the law.

2 Employment rights and representations

2.1 What, if any, are the rights to parental leave, at either a national or local level?

All employees nationally enjoy the right to parental leave. The types of parental leave include:

- maternity leave;
- paternity leave; and
- pre-adoptive leave.

2.2 How long does it last and what benefits are given during this time?

Female employees are entitled to three months' paid maternity leave, while male employees are entitled to two weeks' paid paternity leave. From 15 April 2021, employees who intend to adopt a child are entitled to one month's paid pre-adoptive leave from the date on which the child is placed in their care.

During parental leave, the employee continues to receive his or her full pay.

During maternity leave, annual leave days continue to accrue. With the employer's consent, the employee can extend her maternity leave by taking any outstanding leave days that she might have accrued. The employee also has the right to return to the position that she held before the maternity leave or any other position with similar or better terms.

However, at all times, the employee must give the employer at least seven days' notice of her intention to take maternity leave and at least 14 days' notice of her intention to take pre-adoptive leave.

Termination of employment based on pregnancy or taking parental leave amounts to discrimination.

2.3 Are trade unions recognised and what rights do they have?

Yes, Kenyan law recognises trade unions and the freedom of association in labour relations. The Constitution sets out the rights of trade unions, including:

- the right to determine their administration, programmes and activities;
- the right to organise;
- the right to form and join a federation; and
- the right to engage in collective bargaining with employers or employer organisations.

2.4 How are data protection rules applied in the workforce and how does this affect employees' privacy rights?

The Data Protection Act came into force in 2019. It applies to any natural or legal person that processes personal data, including employers. Employers must process employee data within the concepts and guidelines of the act, which includes developing appropriate technical and organisational measures to

implement data protection principles and safeguard employee rights.

The Data Protection Act provides that employees have the following rights as regards personal data:

- the right to request access to any of their personal data that the employer may have in its possession;
- the right to object to the processing of their personal data;
- the right to demand that the employer correct, rectify or delete their personal data;
- the right to consent to the employer's use of their pictures, films or images to promote the organisation's products or services; and
- the right to have their personal data anonymised such that the employee is no longer identifiable.

The Data Protection Act provides that employers have the following duties as regards personal data:

- Employers must conduct data protection impact assessments where data processing may pose high risks to employees' rights and freedoms. This will help the employer to identify and mitigate any risks to employees.
- Employers should specify the purpose for which employee personal data is collected. For example, if the employer collects information on an employee's family, it should explain why it needs the information (eg, for enrolment on a medical or pension programme).
- Employers should maintain employees' personal data in an accurate and up-to-date way, and should rectify any inaccurate personal data without delay.
- Employers should have data retention limits in place. They should not store employees' personal data in a form that identifies the employee for a longer duration than is required. This implies that employers should review their databases regularly and retain data only within the limitations of the retention period.
- Employers must have a lawful basis for processing employees' sensitive personal data. 'Sensitive data' is data that reveals the employee's:
 - race;
 - health status;
 - ethnic background;
 - social origin;
 - conscience;
 - belief;
 - genetic data;
 - biometric data;
 - property details;
 - marital status;
 - family details, including the names of his or her children, parents, spouse or spouses;
 - sex; or
 - sexual orientation.

Lawful bases for data processing include:

- establishing or defending a legal claim;
- protecting the employee's vital interests; or
- carrying out the employer's obligations as a data processor or controller.

In the case of health data, processing may occur only:

- with the authorisation of a healthcare practitioner;
- if it is in the public interest; or
- if it is carried out by a person required to maintain confidentiality.

- Before transferring an employee's personal data outside Kenya, the employer should ensure adequate security safeguards or obtain the employee's consent.

Where the employer provides services specified in the regulations, it must undertake mandatory registration.

2.5 Are contingent worker arrangements specifically regulated?

No. The relationship between the employer and a contingent worker is a contractual relationship. However, the Kenyan courts have prescribed measures/tests to which the contractual relationship must adhere. They include the following:

- The control test: A contingent worker is considered an expert and the employer should not exert any control over the contingent worker.
- The integration test: A contingent worker is not subject to the rules and procedures of the employer.
- The economic or business reality test: A contingent worker is responsible for the profit and risks in his or her business. Therefore, a contingent worker should be at liberty to assign his or her obligations under the contract and offer services to other employers or organisations.
- The mutual obligation test: The employer is not subject to a continuing obligation to provide work to the contingent worker. The services of the contingent worker terminate once he or she has performed his or her duties under the contract.
- Tax obligations: The contingent worker is responsible for remitting and declaring his or her taxes. The employer has a right to withhold tax at the rate of 5% for payments above KES 24,000 made to the contingent worker.

3 Employment benefits

3.1 Is there a national minimum wage that must be adhered to?

Yes. The Labour Institutions Act gives the cabinet secretary for labour, social security and services the authority to publish wages orders to provide for minimum wages and other matters. The prescribed minimum wage varies for different categories of employees. The minimum wage also differs depending on the employment sector and physical location of employment, and is reviewed by the government periodically.

3.2 Is there an entitlement to payment for overtime?

Yes.

The statutory working hours are:

- 52 hours of work spread over six days of the week; and
- 60 hours of work per week for night workers.

Employees are entitled to at least one rest day in every seven-day period.

Any time that an employee works beyond the regular daily hours of work specified above is deemed overtime. Higher pay rates apply for overtime – time worked in excess of 52 hours is paid at:

- one and a half times the normal hourly rate on a normal working day; and
- twice the normal hourly rate on a rest day or public holiday.

At all times, overtime must not exceed 116 hours for normal working (day) time and 144 hours for night work every two consecutive weeks.

3.3 Is there an entitlement to annual leave? If so, what is the minimum that employees are entitled to receive?

Yes. Employees are entitled to a statutory minimum of 21 days' paid annual leave for each year of service.

3.4 Is there a requirement to provide sick leave? If so, what is the minimum that employees are entitled to receive?

Yes. After two consecutive months of service, an employee is entitled to seven days of sick leave with full pay and seven days of sick leave with half-pay.

3.5 Is there a statutory retirement age? If so, what is it?

There is no universal statutory retirement age; instead, this varies across sectors. The statutory retirement age is 60 for civil servants and 65 for persons living with a disability. The Constitution stipulates that the retirement age for judges is 75.

Where applicable, a collective bargaining agreement (CBA) will stipulate the retirement age of employees covered by the CBA; however, this must adhere to public policy and guidelines.

4 Discrimination and harassment

4.1 What actions are classified as unlawfully discriminatory?

Discrimination, whether direct or indirect, is prohibited against any person:

- on any ground, including:
 - race;
 - colour;
 - sex;
 - pregnancy;
 - marital status;
 - mental status;
 - health status;
 - ethnic or social origin;
 - colour;
 - age;
 - disability;
 - religion;
 - conscience;
 - belief;
 - culture;
 - dress;
 - language; or
 - birth; or
- based on:
 - training;
 - promotion; or

- terms and conditions of employment.

Kenyan employment law enforces the rights and freedoms of employees by providing that an employer may not terminate an employee based on any of the above grounds or for the following reasons:

- the employee's pregnancy or any reason connected therewith;
- a right or proposal to take leave to which the employee is entitled under the law or a contract;
- membership or proposed membership of a trade union;
- participation or proposed participation in the activities of a trade union outside working hours or, with the employer's consent, within working hours;
- seeking office as, or acting or having acted in the capacity of, an officer of a trade union or a worker's representative;
- refusal or proposed refusal to join or withdraw from a trade union;
- race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
- initiation or proposed initiation of a complaint or other legal proceedings against the employer, except where the complaint is irresponsible and without foundation; or
- participation in a lawful strike.

4.2 Are there specified groups or classifications entitled to protection?

Yes:

- Female employees are entitled to protection from termination based on pregnancy.
- Children are protected from the worst forms of child labour – that is, employment that would be harmful to the child's health, safety or morals.
- Children below the age of 13 are protected from any form of employment; and employers can employ those aged between 13 and 16 only in conditions that will not affect their attendance at school and that should not harm their health or development during the day.
- All individuals are protected against all forms of forced labour.

4.3 What protections are employed against discrimination in the workforce?

The Employment Act obliges an employer to:

- ensure equal opportunity in employment;
- ensure that workplace policies and practices are free from discrimination; and
- provide equal remuneration for work of equal value.

Employers that breach these requirements will be guilty of an offence and liable to a fine of KES 100,000, imprisonment for up to six months or both.

The Employment Act also obliges labour officers (Labour officers are officials appointed by the cabinet secretary for labour and employment matters to monitor and enforce compliance with labour laws including inspecting employment records and work conditions, instituting claims at the courts on behalf of employees and against employers) and the Employment and Labour Relations Court to promote and guarantee equality and eradicate discrimination both for Kenyans in employment and for migrant workers.

4.4 How is a discrimination claim processed?

An employee can bring a discrimination claim against his or her employer by filing:

- a statement of claim or a petition in the Employment and Labour Relations Court; or
- a petition in the High Court (Constitutional and Human Rights Division) of Kenya.

4.5 What remedies are available?

Judges have the discretion to award damages against the employer where a discrimination claim is upheld.

4.6 What protections and remedies are available against harassment, bullying and retaliation/victimisation?

The Employment Act includes specific provisions on sexual harassment. An employer with at least 20 employees must have a sexual harassment policy in place and enforce it in the workplace. The policy should provide information on:

- what amounts to sexual harassment;
- the complaints process through which victims of harassment can report it; and
- the applicable disciplinary measures for harassment.

An employer that fails to comply is guilty of an offence and liable to imprisonment for up to six months, a fine of KES 100,000 or both.

5 Dismissals and terminations

5.1 Must a valid reason be given to lawfully terminate an employment contract?

Yes. The law requires employers to have a valid and fair reason for termination. Fair reasons for termination relate to:

- the employee's conduct, capacity or compatibility; or
- the employer's operational requirements.

5.2 Is a minimum notice period required?

Yes. Except in the case of summary dismissal, the notice period for termination is at least 28 days where the employee's salary is paid monthly or a period exceeding one month. If the employee's salary is paid at intervals of less than one month, the notice period should be the duration for which the salary or wage is paid.

However, the parties may provide for a longer notice period in the employment contract.

5.3 What rights do employees have when arguing unfair dismissal?

Employees have the following rights:

- the right to fair labour practices;
- the right to right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair;
- the right to be given written reasons for any administrative action that is taken against them;
- the right to substantive fairness in termination of employment (ie, the reason for termination must be valid and fair); and
- the right to procedural fairness in the termination process. The employee has a right to be heard in the presence of another employee of his or her choosing or union representative, and should be allowed to appeal the decision to terminate if he or she so wishes.

5.4 What rights, if any, are there to statutory severance pay?

Severance pay is paid in case of termination on account of redundancy. An employee who is declared redundant has the right to severance pay calculated at the rate of 15 days' salary for each completed year of service.

6 Employment tribunals

6.1 How are employment-related complaints dealt with?

- Employees have the right to appeal a decision for unfair dismissal or wrongful termination to the employer immediately after delivery of the decision or within such other timeframe as is specified in the employer's disciplinary action processes.
- Employees have the right to lodge complaints with the labour officers in case of:
 - breach of an employment contract;
 - disputes over the rights and liabilities of the parties to the employment contract; or
 - issues of misconduct, neglect or ill-treatment of any party to the employment contract.

Complaints about unfair dismissal or wrongful termination should be lodged with the labour officer within three months of termination.

- Employees have the right to lodge complaints related to any infringement of statutory rights with the Employment and Labour Relations Court.

6.2 What are the procedures and timeframes for employment-related tribunals actions?

The procedure for filing a complaint with the Employment and Labour Relations Court is as follows:

- The claimant must file a statement of claim at the court registry within three years of the date of the events related to the claim. The statement of claim must be accompanied by an affidavit verifying the facts relied on and documentary evidence.
- The court will issue a summons to the claimant which is valid for six months, but may be extended by the court if deemed fit.
- The claimant then serves the statement of claim together with the summons on the respondent. The summons is valid for six months from the date of issue, although this can be extended by the court from time to time. Service should be effected by a licensed process server.
- If it wishes to defend the claim, the respondent has 21 days from the date of service to file a notice to enter appearance, prepare a statement of defence and serve it on the claimant.
- The parties must file an affidavit of service with the court as proof that the other party has been served. The affidavit of service must be accompanied by an acknowledgement of receipt of the served documents. However, the court may effect service on behalf of the requesting party.
- Upon being served with the statement of defence, the claimant has seven days to file and serve a reply to the defence.
- Once both parties have filed their statements, they will be given a date for directions before the court within 14 days. On this date, the court will confirm that all documents are in order. It will also ascertain:
 - the points of agreement and disagreement;
 - the time of the hearing;

- the mode of evidence available;
- the possibility of alternative dispute resolution or settlement; and
- any other matters that it finds necessary.

However, the court may dispense with a pre-trial conference if a lawyer does not represent the parties and if the subject of the trial is not complex.

- If the respondent does not file a response or a defence within the prescribed period, the court may, upon application by the claimant, direct that the matter proceed for formal proof and, if satisfied, enter a judgment in default of a response or defence.
- Upon confirmation of all documents filed and considering any other factors, the court will determine whether the case should proceed to hearing. The court may issue a date for hearing or direct the parties to fix the date at the court registry.
- The parties may call on their witnesses to give evidence on the hearing date. However, the evidence before the court may be provided through affidavit or written statements, as the court may direct.
- The parties will either submit orally or file written submissions following the hearing to close their respective cases before the court.
- Upon conclusion of the hearing and the filing of submissions, the court will issue a judgment within 60 days. The court may award costs or make any declaration in the interests of justice.
- The registrar will draw, seal and issue an order or decree of the court specifying the court's decision.

7 Trends and predictions

7.1 How would you describe the current employment landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Kenyan employment law and the Kenyan employment and labour relations are supportive of employee claims and are said to be 'pro-employee'. While the current law is robust, it still has gaps and does not address issues such as constructive dismissal or the effects of a business acquisition on employees. However, proposed reforms suggest that change is afoot. Current legislative reforms include the following.

Draft (Employment) Amendment Bill 2019: If assented to, the draft (Employment) Amendment Bill 2019 will introduce reforms to the employment laws, including:

- the introduction of rules on the transfer of employees during a business acquisition, merger or transfer, and the treatment of employees in the event of the employer's death;
- the introduction of flexible working time for employees in the workplace;
- the introduction of constructive dismissal, suspension and compassionate leave, which are not recognised under the current employment law;
- the introduction of one month's parental leave for female employees who experience stillbirth and 10 days' education leave for employees undertaking further education;
- an increase in the duration of sick leave from seven days with full pay and seven days with half-pay to 30 days with full pay and 15 days with half-pay;
- the introduction of laws on data protection when an employer processes employees' data and monitors employees; and
- the introduction of arbitration and mediation as a form of dispute resolution in employment claims.

The bill is awaiting its third reading at the National Assembly, although it is unclear how long it will take to be tabled.

Data Protection Act: On 14 January 2022, the cabinet secretary for information and communications technology published the following regulations giving effect to the Data Protection Act's provisions:

- The Data Protection (General) Regulations, 2021 set out procedures for the enforcement of the rights of data subjects such as employees, as stated in question 2.4, and elaborates on the duties and obligations of employers, which are considered to be data controllers. Among other things, the regulations require an employer to publish and regularly update a policy reflecting its personal data handling practices.
- The Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 set out the procedure for lodging a complaint with the Office of the Data Protection Commissioner. An employee may lodge a complaint where he or she is aggrieved by a decision of the employer in respect to the processing of personal data.
- The Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 define the procedure adopted by the Office of the Data Protection Commissioner to register companies as data controllers and data processors under the act. Employees are not considered to be data processors. The regulations will come into force in July 2022.

Employers should familiarise themselves with the provisions and requirements of the Data Protection Act and the stated regulations for compliance purposes.

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points would you highlight?

Employers should ensure that employment contracts and workplace policies conform with the requirements of the law. Any terms that are non-compliant or less favourable than the statutory provisions will be deemed unlawful.

All employers must specifically understand the statutory requirements for termination to avoid a finding of unfair dismissal or wrongful termination of an employee. Courts have the discretion to issue up to 12 months' salary in damages where an employer is found guilty of unfair dismissal or wrongful termination.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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